IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 307

HARRY W. CLINE, TRUSTEE IN BANKRUPTCY OF GOLD MEDAL LAUNDRIES, INC.,

Petitioner,

vs.

ARTHUR S. KAPLAN, HARRY KOPLIN, AND BUDGET LAUNDERERS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Harry W. Cline, trustee in bankruptcy of Gold Medal Laundries, Inc., respectfully prays that a writ of certiorari issue to the Circuit Court of Appeals for the Seventh Circuit to review an order of that court entered April 12, 1944 (petition for rehearing denied June 6, 1944) reversing an order of the United States District Court for the Northern District of Illinois, Eastern Division. A certified transcript of the record in the case,

including the proceedings in the Circuit Court of Appeals, is furnished herewith in accordance with the rules of this Honorable Court.

Statement of the Matter Involved.

This case raises the question as to when a respondent may object to the summary jurisdiction of a bankruptcy court to hear a petition filed by the trustee under Section 60(b) of the Bankruptcy Act to recover assets for the estate. Applied to the facts the problem is: May respondents, having appeared generally, having pleaded fully to the merits of the trustee's petition for a turn-over order (without raising any objection to the summary proceeding), and having participated in and introduced evidence at the several hearings on the merits, nevertheless, at the conclusion of all evidence, but before the court has entered its order, object to summary jurisdiction? The Circuit Court of Appeals for the Seventh Circuit held that objection may be raised at any time before the final order of the court, relying on *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18. A decision on this question is of prime importance in the administration of the Bankruptcy Act.

The Trustee in bankruptcy, the petitioner here, filed a petition with the referee for an order on the respondents to turn over to the trustee certain real and personal property. The petition recites in detail the various transactions between the bankrupt and the respondents and the basis on which the trustee asserts his right to the disputed property (R. 6-10). The answer of respondents denies some of the allegations of the petition, denies knowledge and demands strict proof of others, challenges the legal sufficiency of other parts of the petition and makes additional averments of fact as to the ownership of the property in question. It does not raise any jurisdictional question. In the petition for re-hearing filed with the court

below we set forth verbatim in numerical order every allegation of the petition and after each allegation the answer of the respondents to such allegation (See R. 415-24).

Eight hearings were held before the referee on the petition and answer, extending over a period of three and one-half months. At these hearings 16 witnesses testified for both sides, 26 exhibits were introduced and 435 typewritten pages of testimony were taken. All of the evidence related to transactions, conversations and documents concerning the merits of the case, viz., the rights of ownership and possession of the contested property.

After all proofs were closed, but before a decision was rendered by the referee, new attorneys entered their special and limited appearance as co-counsel for respondents and moved for the entry of an order determining that respondents were adverse claimants and the court had no jurisdiction to adjudicate their rights in the property involved (R. 19). The referee entered an order dismissing the petition for want of summary jurisdiction. The District Court, on a petition to review, reversed the referee and concluded that the respondents had consented to jurisdiction. In a memorandum of opinion the District Court said (R. 343):

> "Here, the jurisdiction of the Referee to hear the controversy in a summary proceeding was not challenged until after there had been an answer on the merits, an extensive hearing on the merits, the proofs closed, and the case ready for decision by the Referee. The court is of the opinion that the respondents have waived their privilege of demanding that the matter be heard in a plenary proceeding and that they have consented to the summary jurisdiction."

The District Court re-referred the matter to the referee with directions to decide the issues on the merits. The referee then filed a memorandum of opinion and order dis-

missing the trustee's petition for a turn-over order on the merits (R. 348-58). On trustee's second petition for review the District Court again reversed the referee's order on the merits and directed the respondents to turn over to the trustee the disputed property (R. 374-9). Respondents then prosecuted an appeal to the Circuit Court of Appeals for the Seventh Circuit charging that the District Court committed error in ruling that respondents had consented to the summary jurisdiction of the court and in ordering them to turn over to the trustee the property involved. The Circuit Court of Appeals reversed the order of the District Court, holding that as objection to summary jurisdiction was made before the referee prior to the entry of the final order on the issues, the court was without jurisdiction to decide the case, basing its decision on *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18. The gist of the opinion of the Court of Appeals is as follows (R. 403-5):

> "The case most nearly in point, according to our view, is *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18. There, the adverse party answered the petition for turn-over and some five months later for the first time raised the jurisdictional question before the referee. The referee's holding that the question was not raised in apt time was sustained by the District Court. The action of the District Court was predicated upon an implied consent on the part of Comingor. As pointed out by the Circuit Court of Appeals (107 Fed. 898, 904): 'But the district judge puts his conclusion upon the ground that the petitioner has acquiesced in the course pursued, by making response to the orders, asking to be relieved in the premises, and going into proof before the referee, and making stipulations concerning the proof on the reference.' The Circuit Court reversed the District Court and held that the attack upon summary jurisdiction was sufficient. The Supreme Court affirmed, and in holding that the juris-

dictional attack was timely pointed out that *'he made his formal protest to the exercise of jurisdiction before the final order was entered.'*" (Italics ours)

The Court of Appeals misapprehended a significant fact in the *Comingor* case. The court said: "There, the adverse party answered the petition for turn-over * * *." This is not the fact. There was no petition filed in the *Comingor* case. As this court said in the *Comingor* case, 184 U. S. 18, at page 25:

> "Nor in this matter was any Petition by the Trustee, or by any other person, filed against Comingor to recover these sums, and the Orders were entered by the Referee on the record as it stood, so that there was no pretense whatever of a plenary suit in that Court, in form or in substance."

As we shall demonstrate in our brief in support of this petition, the *Comingor* case does not support the proposition that an adverse claimant may, at any time prior to the entry of the final order, withdraw his general appearance, disregard his pleadings on the merits, ignore all evidence taken at the hearings, and move for the first time to dismiss the proceeding for lack of summary jurisdiction.

It will serve no useful purpose to narrate or summarize the voluminous amount of evidence presented in support of the merits of the trustee's petition and the answer of respondents. To do so would extend this petition considerably without aiding the court in passing on the question involved. It required 8 full hearings and 16 witnesses to tell the story for both sides. The record includes 26 exhibits and 435 pages of typewritten testimony. All of the conversations, transactions and documents related to the right of ownership and possession of the property and whether or not seizure of that property by respondents

was lawful. The plenary suit referred to by the Court of Appeals as pending in another court involves other issues.

It is significant, however, to point out that at one of the late hearings before the referee the trustee's attorney made a motion to strike certain testimony of one of respondents' witnesses, at which time counsel for respondents raised a verbal objection to jurisdiction. The following colloquy occurred (R. 238):

> "The Court (addressing counsel for respondents): Did you attack the jurisdiction? You have answered this petition, have you not?
>
> "Counsel for Respondents: I would like to file a written motion and present arguments on it.
>
> "The Court: I will give you leave to do that."

At the next hearing the following colloquy occurred with reference to respondents' motion to strike the trustee's petition for want of jurisdiction:

> "Counsel for respondents: I am withdrawing that motion that was pending here (meaning the motion contesting the summary jurisdiction of the court).
>
> "The Court: All right. The record may show the motion is withdrawn. Leave to withdraw the motion to strike the petition for want of jurisdiction." (R. 242)

It is apparent that attorneys for respondents specifically asked leave to file a written motion and argument attacking the jurisdiction of the court and this after the referee had informed them that respondents had answered the petition and also after most of the proof was in. Subsequently counsel for respondents expressly withdrew their motion. This voluntary and express withdrawal by respondents of their motion to dismiss the petition for want of jurisdiction constituted, we submit, a consent to permit

the court to continue to hear the case on the merits. Notwithstanding this record, the Court of Appeals holds that no matter what has transpired in the course of the proceeding, a respondent may nevertheless at any time prior to the entry of a final order, protest the jurisdiction of the court.

Conflict of Circuits.

The opinion of the Court of Appeals admits that there is a conflict among the circuits on the question involved. The court said (R. 403):

> "In the *West* case (meaning *In Re West Produce Corp.*, 118 Fed. (2d) 274) (CCA 2nd) (1941) the court said: 'An objection to a summary jurisdiction must be timely. It comes too late if first made after the Referee has issued his turn-over order. * * *. We think it is also too late if first made at the time of submission for decision, after answer and a hearing on the merits.' *While the last sentence of this quotation furnishes support for the trustee's position, we think it is contrary to the weight of authority.*" (Italics ours)

The Second Circuit also held in the *Matter of Realty Associates Securities Corp.*, 98 F. (2d) 722 (1938), pages 724-25:

> "If there ever was any right to attack the jurisdiction of the court to entertain a summary proceeding because of the nature of the issues involved, it was waived by failure to object on that ground and by proceeding to a trial on the merits."

The Eighth Circuit held in *First State Bank* v. *Fox*, 10 Fed. (2d), C.C.A. (8th), 116 (1925), at page 118:

> "As to contention that possession of the property not being in the Trustee, but in appellant bank, as an

adverse claimant, it was entitled to have its rights relative thereto adjudicated in a plenary action, rather than in a summary proceeding, such privilege is waived by not timely raising the question, but joining issue before referee and participating in such hearing."

It is evident that the Circuit Court of Appeals for the Seventh Circuit has rendered a decision in conflict with the decisions of other circuits on a matter of fundamental importance in bankruptcy practice. This court has held that objection to summary procedure may be waived by express consent. *MacDonald* v. *Plymouth County Trust Co.*, 286 U. S. 263. It has not held there may be an implied consent. Confusion exists and a decision clarifying the subject is needed.

Jurisdiction to Review.

The jurisdiction of this court is invoked under Sec. 240(a) of the Judicial Code as amended by Act of February 13, 1925 (28 U.S.C.A. Sec. 347A). The date of the opinion of the Circuit Court of Appeals for the Seventh Circuit sought to be reviewed was April 12, 1944. Petition for re-hearing was denied June 6, 1944.

Questions Presented.

1. May respondents to a trustee's petition for a turnover order filed under Sec. 60(b) of the Bankruptcy Act, having appeared generally, having pleaded fully to the merits of the petition, without contesting the court's jurisdiction, having participated in the several hearings on the issues, and having presented evidence in support of their answer, nevertheless, at the conclusion of all proof, but before the entry of a final order, object to the court's summary jurisdiction?

To state the proposition otherwise: Where a trustee in bankruptcy files a petition for a turn-over order under Sec. 60(b) of the Bankruptcy Act, does the conduct of respondents in appearing generally, answering the petition on the merits (without raising any objection to the court's jurisdiction), participating in various hearings on the merits, and introducing evidence in support of the answer, constitute a consent to the court's jurisdiction to hear the issues summarily?

Reasons Relied On for Allowance of the Writ.

1. The question involved in this appeal is vital in the administration of the Bankruptcy Act. Literally hundreds of petitions are filed annually by trustees in bankruptcy for the recovery of assets. May a respondent wait until all proof is in and then for the first time object to the court's summary jurisdiction? The Court of Appeals answered the question in the affirmative. This court has never ruled on this proposition and it is submitted that a decision on the problem is of prime importance in bankruptcy administration.

2. The decision of the Circuit Court of Appeals for the Seventh Circuit resulted from a misapprehension of the facts in *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18 and because of such misapprehension the court misconstrued and misapplied that decision to the instant case.

3. The decision of the Circuit Court of Appeals for the Seventh Circuit in the instant case is such a radical departure from the customary course of procedure in proceedings under the Bankruptcy Statute as to call for the exercise by this court of its power of supervision.

4. The decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit and for the Eighth Circuit.

PRAYER.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, commanding said court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and of all proceedings of the Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the order of the Circuit Court of Appeals for the Seventh Judicial Circuit reversing the decree of the District Court be reversed and remanded and that petitioner be granted such other and further relief as may seem proper.

EDWARD ROTHBART,
Counsel for Petitioner.

SIMON H. ALSTER,
Of Counsel.

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vs.

ARTHUR S. KAPLAN, HARRY KOPLIN, and BUDGET LAUNDERERS, INC.,

Respondents.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The District Court filed a memorandum of opinion on the question involved and the same is printed in full in the record. (R. 340-2).

The opinion of the Circuit Court of Appeals (R. 401-5) has been officially reported at 142 Fed. (2)-301.

Statement of the Case.

A statement of the matter involved has been fully presented in our petition and the Court is respectfully referred to pages 2 to 7 herein. In the interest of brevity, the statement is not repeated here.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In reversing the order of the District Court.

2. In holding that objection to the summary jurisdiction of a bankruptcy court may be raised by a respondent to a trustee's petition for a turn-over order at any time before the final order of the court.

3. In holding that *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, stands for the proposition that protest to summary jurisdiction of a bankruptcy court may be interposed at any time prior to the final order of the court.

Summary of Argument.

I. The decision of the court below that objection to summary jurisdiction may be made at any time before the final order of the court on the issues, is not supported by *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18. This court said in that case "there was no pretense whatever of a plenary suit in form or in substance," and the respondent "pleaded his claims in the outset."

II. Where respondents to a trustees' petition for a turn-over order appear generally, plead to the merits, introduce evidence and otherwise participate in hearings on the merits, they waive their privilege of demanding that the issues be heard in a plenary proceeding and consent to the summary jurisdiction of the court.

III. In *MacDonald* v. *Plymouth County Trust Co.*, 286 U. S. 263, this court affirmed the First Circuit in its holding 53 Fed. (2nd) 827 that a colloquy between counsel was sufficient to manifest consent to jurisdiction. The court below failed to follow this holding and held that, notwithstanding the pleading and all that had transpired at the

hearings, objection to summary jurisdiction may be made at any time before the entry of the court's final order.

IV. The opinion of the court below leads to results grossly inequitable to a trustee in bankruptcy.

ARGUMENT.

I.

The decision of the court below that objection to summary jurisdiction may be made at any time before the final order of the court on the issues is not supported by Louisville Trust Co. v. Comingor, 184 U. S. 18.

It is the contention of petitioner that *Louisville Trust Co. v. Comingor*, 184 U. S. 18 does not support the holding of the Circuit Court of Appeals for the Seventh Circuit that no matter what has transpired in the course of a summary proceeding, a respondent may at any time prior to the entry of a final order on the issues, object to the summary jurisdiction of the court. In view of the holding of the Court of Appeals that the *Comingor* case is virtually decisive of this controversy, we believe that a brief resumé of the facts and issues of that case are pertinent.

In the *Comingor* case an assignment for the benefit of creditors was made to Comingor as assignee pursuant to a Kentucky statute. In accordance with the Kentucky statute, the assignment was administered in a Kentucky court and the assignee was at all times subject to the court's jurisdiction. An involuntary petition in bankruptcy was subsequently filed against the assignor and adjudication

followed. The matter was then referred to the referee for administration. In the course of administration it came to the attention of the referee that the assignee had, prior to the bankruptcy, but during administration under the assignment, paid some fees to himself and to his attorney. The referee promptly, without notice or petition or application by an interested party, entered an *ex parte* rule against Comingor as assignee, and his counsel, to appear three days thereafter and show cause why he should not turn over to the bankruptcy receiver the amount of fees paid to himself and to his attorney. Comingor responded that he had retained the money on account of commissions as assignee; that he relied on the fact that he would be entitled to more than that sum on final settlement; that he believed the court would allow at least the sum retained; that he was a person of no means and that he had used said money from time to time relying on the fact that it belonged to him and he had none of it left, and he was unable to pay said money into court as he had no money or property of any kind. About five months later Comingor, for the first time, raised the jurisdictional question before the referee. The referee ruled that the question was not raised in apt time and he was sustained by the District Court. The Court of Appeals reversed the District Court and this court affirmed the Circuit Court. This court said of Comingor, at page 26:

> "He did not come in voluntarily, but in obedience to peremptory orders and that although he participated in the proceedings before the referee he had pleaded his claims *in the outset.*" (Italics ours)

And this court further observed at p. 25:

> "Nor in this matter was any Petition by the Trustee, or by any other person, filed against Comingor to recover these sums, and the Orders were entered by the Referee on the record as it stood, so that there

was no pretense whatever of a plenary suit in that Court, in form or in substance."

Two facts differentiate the *Comingor* case from the instant case. In our case the trustee asked leave of court to file his petition and the respondent asked leave of court to answer. There was no element of coercion on respondents. There was a plenary suit in form and in substance. Clear issues were created by the petition and the answer. In the *Comingor* case the referee, in an *ex parte* hearing, entered a peremptory order on respondent to restore funds to the estate. As this court said: "There was not pretense whatever of a plenary suit in form or in substance." In the *Comingor* case respondent pleaded his claims "at the outset," and in the instant case respondents did not assert any jurisdictional objections until all proof was in and the issues were ready for the court's decision.

It is true that this court did say in the *Comingor* case that "he (Comingor) made his formal protest to the exercise of jurisdiction before the final order was entered." The court found, however, that he had pleaded his claims at the outset. It is well settled that a decree is to be construed with reference to the issues it was intended to decide, and if its language is broader than is required it will be limited by construction so that its effect shall be such only as is needed for the purposes of the case. *City of Vicksburg* v. *Henson*, 231 U. S. 259, 269.

It is respectfully submitted that the *Comingor* case, 184 U. S. 18, does not hold that a respondent, notwithstanding his appearance generally, his answer to the merits, his participation in the trial of the issues, may, at any time, before the final order of the court, reject all that has transpired and protest for the first time the court's summary jurisdiction.

II.

Where respondents to a trustee's petition for turn-over order appear generally, plead to the merits, introduce evidence and otherwise participate in hearings on the merits, they waive their privilege of demanding that the issues be heard in a plenary proceeding and consent to the summary jurisdiction of the court.

It is the contention of the trustee in bankruptcy, the petitioner here, that respondents, having appeared generally, having pleaded to the merits of the petition, and having proceeded to and participated in the several hearings on the merits, have waived their privilege of demanding that the issues be heard in a plenary proceeding, and have by their conduct impliedly consented to the jurisdiction of the court.

That objection to summary procedure may be waived by consent was held by this court in *MacDonald* v. *Plymouth County Trust Company*, 286 U. S. 263, where Mr. Justice Stone said, at page 267:

> "And we can perceive no reason why the privilege of claiming the benefits of the procedure in a plenary suit, secured to suitors under section 60(b) and section 23(b), may not be waived by consent, as any other procedural privilege of the suitor may be waived, and a more summary procedure substituted."

This court further said, in *Harris* v. *Avery Brundage Co.*, 305 U. S. 160, at page 164:

> "Since the parties had only a procedural right to have these issues tried in a plenary suit, they were at liberty to waive this right."

In the case of *Fairbanks Co.* v. *Wills*, 240 U. S. 642, a question arose concerning the jurisdiction of a district

court to entertain a proceeding under Sec. 2 of the then Bankruptcy Act. This court said, at page 649:

> "As to this, the Circuit Court of Appeals correctly held that appellant, by answering and making defense upon the merits, consented to the jurisdiction, so that whether, under Section 23a and 23b, construed together with Section 70e, as amended, consent to the jurisdiction of the District Court was required, need not be considered."

In the recent case of *In Re West Produce Corp.*, 118 Fed. (2d) 274 (1941), the court said at page 277:

> "An objection to a summary jurisdiction must be timely. It comes too late if first made after the Referee has issued his turn-over order. • • • *We think it is also too late if first made at the time of submission for decision, after answer and a hearing on the merits.*" (Italics ours)

In the case of *First State Bank* v. *Fox*, 10 Fed. (2d), C.C.A. (8th) 116 (1925), the court said at page 118:

> "As to contention that possession of the property not being in the Trustee, but in appellant bank, as an adverse claimant, it was entitled to have its rights relative thereto adjudicated in a plenary action, rather than in a summary proceeding, such privilege is waived by not timely raising the question, but joining issue before referee and participating in such hearing."

In the Matter of Prebronx Realty Corporation, 17 A.B.R., (N.S.) 346, a referee in bankruptcy said at page 346:

> "For the first time the attorney for the respondents raised the question of the referee's jurisdiction by his motion to dismiss *after the testimony was all in.* He did not raise it by answer nor on the threshold of the

hearings. These motions and the question sought to be raised came too late." (Italics ours)

To the effect that filing a general appearance constitutes a waiver of objection to summary procedure, see *Bachman* v. *McCluer*, 63 F. (2d) 580 (C.C.A.Mc.); *In Re Falk*, 30 F. (2d) 607. It has also been held that answering to the merits waives objection to a summary proceeding. *In re Lipton* (D.C. N.Y.) 4 F. Supp. 799; *In re, Franklin Brewing* (D.C. N.Y., 257 F. 135.

In the Matter of Ackerman, 82 F. (2d) 971 (1936) (C.C.A.6), the court said at page 972:

> "No question arises as to the jurisdiction of a bankruptcy court to proceed summarily. Objection was not made by the respondent to the power of the court to entertain the petition for turn-over order on the ground that he was an adverse claimant, and consent to adjudication thereon is plainly inferable."

In the Matter of Realty Associates Securities Corp., 98 F. (2d) 722 (1938) (C.C.A.2d), the court said at pages 724-5:

> "If there ever was any right to attack the jurisdiction of the court to entertain a summary proceeding because of the nature of the issues involved, it was waived by failure to object on that ground and by proceeding to a trial on the merits."

It was held in *Latex Drilling Co.*, 11 F. (2d) 373 (D.C. W.D.La.) that where all parties appear in the proceeding and no objection to summary procedure is raised, the right to a plenary suit is waived.

Textbook writers have uniformly declared that proceeding to a hearing on the merits constitutes a waiver of objection to jurisdiction and amounts to consent to the court's

summary procedure. Collier on Bankruptcy, under the heading "Summary Jurisdiction By Consent" 14th Ed., Vol. 2, says at page 509:

> "Clearly, however, the rule still prevails that where the claimant proceeds to a hearing upon the merits, without objection to the jurisdiction, he will be deemed to have consented."

Remington on Bankruptcy, under the heading of "Jurisdiction Over Adverse Claimants," Vol. 5, says at pages 338-9:

> "On the other hand, answering to the merits without objection is consent, and it has been held that by appearing generally and demurring on the grounds going to the merits as well as to the jurisdiction of the court, a defendant waives the objection that the court is without jurisdiction. The appearance in the bankruptcy proceedings and, without objection to the jurisdiction, the submission of the questions of ownership or of priority to the referee for adjudication, amount to consent."

In Corpus Juris Secundum, Vol. 8 (Bankruptcy) it is said (pages 1123-25):

> "Thus, when an adverse claimant puts in a general appearance and submits his claim in a summary proceeding, he consents to that form of procedure, at least where he fails to object; by answering on the merits he waives objection to summary jurisdiction."

With the greatest respect to the Circuit Court of Appeals for the Seventh Circuit, we submit that the overwhelming weight of authority supports the proposition that objection to summary jurisdiction must be timely made and that it comes too late after pleading on the merits, hearing on the

issues and the cause is ready for submission to the court for decision.

If, as the Court of Appeals holds, a respondent may raise a jurisdictional objection at any time prior to the entry of a final order, a trustee in bankruptcy is placed in a most disadvantageous position, and conversely, a respondent is given a tremendous advantage. A respondent might wait until all the evidence is introduced, and if he thinks the record is unfavorable to him, he will naturally move to dismiss the petition for want of jurisdiction and hope for a better record in another court. The trustee could never know until the court actually entered a final order whether or not the matter was being heard on the merits or whether the respondent would at the very end interpose an objection to jurisdiction and move for dismissal of the trustee's petition. If the decision of the Court of Appeals stands, the door is wide open for respondents in the Seventh Circuit to wait until all proof is in and then decide whether it is advisable to object to the court's jurisdiction or permit decision on the merits. This is the logical result of the rule as announced by the Court of Appeals. We cannot conceive that this court will countenance such practice.

This court has never squarely decided this proposition and in view of its importance in bankruptcy practice it is submitted that a ruling by this court is essential.

III.

In MacDonald v. Plymouth County Trust Co., 286 U. S. 263, this court affirmed the First Circuit in holding, 53 F. (2d) 827, that a colloquy between counsel was sufficient to manifest consent to jurisdiction. The court below failed to follow this holding.

As we stated in our petition, at one of the late hearings before the Referee the trustee's attorney moved to strike

certain testimony of a witness for respondents. Counsel for respondents then verbally moved to dismiss the petition for want of jurisdiction. The following colloquy occurred:

> "The Court (addressing counsel for respondents): Did you attack the jurisdiction? You have answered this petition, have you not?
>
> "Counsel for respondents: I would like to file a written motion and present arguments on it.
>
> "The Court: I will give you leave to do that." (R. 238)

At the next hearing a further colloquy occurred with reference to respondents' motion to strike the trustee's petition for want of jurisdiction, as follows:

> "Counsel for respondents: I am withdrawing that motion that was pending here (meaning the motion to contest the court's jurisdiction).
>
> "The Court: All right. The record may show the motion is withdrawn. Leave to withdraw the motion to strike the petition for want of jurisdiction." (R. 242)

In *MacDonald* v. *Plymouth County Trust Company*, 53 F. (2d) 827, the Circuit Court of Appeals for the First Circuit held that a colloquy between counsel for trustee and the claimant had the effect of a consent by adverse claimants to submit the issues to the referee in bankruptcy. The second circuit said, at page 829:

> "While appellant apparently refused to submit to summary jurisdiction with the referee, the effect of this colloquy, we think, was a consent by appellant to hear the matter before the referee."

This court affirmed the case in 286 U. S. 263.

We submit that the colloquy in this case between counsel for respondents and the referee manifested a consent by

respondents to the hearing of the issues by the court in a summary manner. Counsel for respondents specifically asked leave to file a written motion and argument attacking the summary jurisdiction of the court and this after the court had informed him that respondents had answered the petition. Subsequently counsel for respondents expressly withdrew their motion. It is submitted that this voluntary and express withdrawal by respondents of their motion to dismiss the petition for want of jurisdiction, constituted a consent to permit the court to continue to hear the case on the merits. In spite of this record, the court below holds in effect that no matter what has transpired in the course of the proceeding, a respondent may nevertheless at any time prior to the final order of the court object to summary jurisdiction.

IV.

The opinion of the court below leads to results grossly inequitable to a trustee in bankruptcy.

We find it difficult to reconcile the opinion of the court below with simple justice. Since the opinion holds that a respondent may object to summary jurisdiction at any time before the court's final order, its effect is to afford a respondent a right to two trials. If after all the evidence is introduced respondent deems the record unfavorable to him, he will naturally invoke his right to object to jurisdiction. The trustee will then be required to institute another suit in another court. The usual law's delays will follow to the advantage of respondent and to the detriment of the trustee. Since the trustee must prove his case, it will greatly benefit a respondent if witnesses disappear and recollections become hazy. A respondent will have the benefit of a full knowledge of the trustee's case and will govern himself accordingly at the second trial, if, indeed,

there is a second trial. A trustee may or may not be armed with similar information depending on whether or not a respondent elects to put in his case. A trustee will never know until an order is signed by the court whether his case is being heard on the merits or whether a respondent will at the end invoke a jurisdictional objection. The decision of the Court of Appeals leads to results so inequitable to a trustee in bankruptcy that we cannot believe it will receive the sanction of this court.

CONCLUSION.

We submit that the factors which warrant relief in this case are:

(1) The opinion of the Circuit Court of Appeals for the Seventh Circuit misapprehends, misconstrues and misapplies the holding of this court in *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18.

(2) The opinion of the Circuit Court of Appeals for the Seventh Circuit is so far a departure from the accepted and usual course of proceedings in administration of the Bankruptcy Act as to call for the exercise by this court of its power of supervision.

(3) The opinion of the Circuit Court of Appeals for the Seventh Circuit is in conflict with the decisions of the Second Circuit Court of Appeals in *In Re West Produce Corp.*, 118 F. (2d) 274 and in conflict with the decision of the Eighth Circuit Court of Appeals in *First State Bank* v. *Fox*, 10 Fed. (2d), C.C.A. (8th), 116.

(4) The question of law involved is in confusion and needs clarification and is of vital importance in the administration of the Bankruptcy Act.

Wherefore it is earnestly urged that certiorari be granted by this court, requiring the Circuit Court of Appeals for the Seventh Circuit to certify the record in this case to this court for review and determination.

Respectfully submitted,

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